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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1489

P. M. NESBITT,

Appellant,

vs.

EDWIN M. GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT OF JURISDICTION UNDER RULE 12

Appellant submits the following statement of the basis on which it is contended the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of North Carolina:

A

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under Section 237(a) of the Judicial Code as amended by the act of February 13, 1925, Chapter 229, 43 Stat. 937, U. S. Code, Ann., Title 28, Section 344.

The judgment of the Supreme Court of North Carolina is a final judgment in this suit under Article IV, Sections 2 and 8 of the Constitution of the State of North Carolina and Sections 1-235, 1-297, 1-298, 7-11 and 7-12 of the General Statutes of North Carolina and as construed and applied in

Alspaugh v. *Winstead*, 79 N. C. 526 (1878);

Corporation Commission v. *Atlantic Coast Line R. Co.*, 187 N. C. 424, 121 S. E. 767 (1924), affirmed 206 U. S. 1, 51 L. Ed. 933 (1906);

Chavis v. *Brown*, 174 N. C. 122, 93 S. E. 471 (1917), and

Davis v. *Storage Company*, 186 N. C. 676, 682, 120 S. E. 462.

B

The Statute of the State, the Validity of Which Is Involved

The statute or act passed by the Legislature of North Carolina, the validity of which as amended is drawn in question and which it is contended is unconstitutional and repugnant to Article 1, Section 8 of the Constitution of the United States and the 14th Amendment of the Constitution of the United States is Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939, pages 213 to 216 inclusive, which act was duly amended by the Legislature by Subsection "E" of Section 3, Chapter 50 of the Public Laws of North Carolina, Session 1941, page 68, which said act as so amended reads as follows:

> "*Dealers in horses and/or mules.* Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual

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tax for each location where such business is carried on as follows:

Where not more than one carload of horses and/or mules is purchased for the purpose of resale	$25.00
Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale	50.00
Where more than two carloads of horses and/or mules are purchased for the purpose of resale	100.00

"For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25) and purchases for the preceding license tax year shall be used as a medium for arriving at the amount of tax due for the ensuing year: Provided, however, that if during the current license year horses and/or mules are purchased for the purpose of resale in such quantities that would establish liability for a greater tax than that previously paid, it shall be immediately remitted to the commissioner of revenue with the license which has already been issued in order that it may be canceled and a corrected license issued.

"In addition to the above license, every person, firm, or corporation engaged in the business of purchasing for the purpose of resale and/or selling horses and/or mules at public auction, either on his or its own behalf or for any other person, whether a commission or fee is or is not charged, shall apply for and procure from the commissioner of revenue a state license for each place of auction and shall pay for such license an annual tax of one hundred dollars ($100.00).

"In addition to the above license, every transient vendor of horses and/or mules who has no permanent or established place of business in this state shall apply for and procure from the commissioner of revenue a state license for each county in which horses and/or

mules are sold and shall pay for such license an annual tax of three hundred dollars ($300.00).

"(a) In addition to the annual licenses levied in this section, every person, firm, or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per head on all such horses and/or mules purchased for the purpose of resale. 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however, that 'purchases' shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. 'Purchases' shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise.

"The original or first dealer or consignee, purchasing or receiving horses and/or mules in this state, shall be primarily liable for payment of the additional per-head tax levied in this section. Horse and/or mule auctioneers, engaged in the business of purchasing, acquiring or receiving on consignment, account or otherwise, either as principal or agent, horses and/or mules from out-of-state dealers or other persons and selling same at either private or public auction, shall be primarily liable for payment of the additional per-head tax levied in this section unless sold to a licensed dealer for the purpose of resale. In order to avoid double taxation, dealers purchasing or acquiring horses and/or mules from another established dealer located within this state may be relieved of reporting the additional per-head tax on such horses and/or mules acquired from

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another dealer located within this state, proveded an official receipt or statement from the commissioner of revenue or his duly authorized agents is produced, showing that the additional per-head tax levied in this section has been paid.

"The additional per-head tax levied in this section on purchases of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state. The commissioner of revenue may, however, in his discretion, where he thinks circumstances justify it, permit licensed and established dealers to file monthly reports, which reports shall be due to be filed on or before the fifteenth (15th) of each month for all purchases during the preceding month, and such report when filed shall be accompanied by a remittance for the amount of tax shown to be due. Reports shall be filed in such form and in such manner as may be prescribed by the commissioner of revenue, and failure to file the report herein prescribed and pay the tax as shown to be due thereon shall subject such dealer to a penalty of five per cent (5%) of the amount of tax due for each month or fraction thereof that such report may be delinquent.

"(c) Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall keep a full, true and accurate record of all purchases and sales, including purchase invoices and freight bills covering such purchases and sales of all horses and/or mules until such purchases and sales, including purchase invoices and freight bills, have been checked by a duly authorized agent of the commissioner of revenue. Failure to comply with the provisions of this section in this respect shall be prima facie evidence of attempting to evade the additional taxes levied in this section and shall subject such dealer, in addition to all other penalties imposed by this article, to the additional per-head tax on all purchases and/or sales from whatever source such horses and/or mules are acquired or received, and

it shall be the duty of the commissioner of revenue or his duly authorized agents to assess the additional tax upon an estimation of purchases and/or sales from the best information obtainable.

"(d) As a condition to the issuance or the continuance of the annual license levied in this section, and in order to secure the payment of the additional per-head tax levied on purchases and/or sales in this section, the commissioner of revenue may in his discretion, when it appears reasonably necessary therefor, require any dealer in horses and/or mules, applying for a license under this section, to post a surety bond or other adequate security sufficient to guarantee and secure the payment of any tax due under this section.

"(e) Any person, firm, or corporation, required to procure from the commissioner of revenue a license under this section, who shall purchase and sell or offer for sale by principal or agent any horses and/or mules without first having obtained such license, or shall fail, neglect or refuse to file any report and pay the additional taxes levied in this section when due and payable, shall in addition to the other penalties imposed by this article, be deemed guilty of a misdemeanor and upon conviction shall be fined not to exceed one hundred dollars ($100.00) and/or imprisoned not less than thirty days (30) within the discretion of the court."

C

The Date of the Judgment and the Application for Appeal

The decree and judgment sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 5th day of March, 1947. (Reported in 227 N. C. (Advance Sheets) page 174.)

The petition for appeal, assignment of errors and prayer for reversal were presented to the Chief Justice of the Supreme Court of the State of North Carolina on the 29th day of May, 1947, and the order allowing said appeal was

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executed and the appeal bond approved on the 29th day of May, 1947.

D

Nature of the Case and Rulings Below

The appellant, a citizen and resident of Buncombe County, North Carolina, on or about March 15, 1943, by and through his duly authorized agent, purchased seventy-eight horses at ranches located in and about Sidney, Montana, which horses were shipped by appellant from Sidney, Montana, to Asheville, North Carolina, during the months of March, June and July, 1943 (R. P. 26).*

The respondent Commissioner of Revenue of North Carolina, thereupon on or about April 19, 1945, demanded that plaintiff pay to the Department of Revenue, State of North Carolina, the sum of $407.40, being taxes and penalties allegedly due under and by virtue of Section 115 of Chapter 158 of the Public Laws of North Carolina, Session 1939, as amended (R. P. 26).

Section 939, of Chapter 158 of the Public Laws of North Carolina, Session 1939, reads in part as follows:

> "No Court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense of rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Commissioner of Revenue of the State if a state tax. . . ."

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* Refers to transcript of record from Supreme Court of North Carolina. Record in this case not yet printed.

The foregoing Act has been consistently construed by the Supreme Court of North Carolina to define the only remedy available to the taxpayer either to prevent collection of illegal taxes and assessments or to recover back taxes unlawfully or erroneously exacted.

Bunn v. *Maxwell*, Commissioner of Revenue, 199 N. C. 557; 155 SE 250 (1930);

Hunt v. *Cooper*, Sheriff of Bertie County, 194 N. C. 265; 139 SE 446 (1927);

Richmond and Ohio Railroad Co. v. *Town of Reidsville*, 109 N. C. 494; 13 SE 865 (1891).

And the Supreme Court of North Carolina has further ruled that strict compliance with the requirements of the above quoted statute is essential to recovery.

Bunn v. *Maxwell*, Commissioner of Revenue, *supra*; *Power Company* v. *Clay County*, 213 N. C. 698.

Pursuant to the terms of said statute the appellant, on November 3, 1945, paid the respondent, Commissioner of Revenue of North Carolina, the sum of $407.40, and on the same date notified respondent in writing that appellant paid said sum under protest. (R. P. 26.)

Thereafter, on or about November 9, 1945, and within thirty days after said payment under protest, appellant duly demanded in writing that respondent Commissioner of Revenue of North Carolina refund or repay to appellant the said sum of $407.40. This demand was denied by respondent in writing by letter dated January 24, 1946, in which receipt of demand was acknowledged. (R. P. 27.)

Thereupon, on the 16th day of April, 1946, appellant instituted this action to recover from respondent Commissioner of Revenue the aforesaid sum of $407.40. (R. P. 1, paragraphs 2 & 3.)

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In the complaint filed in this cause it was alleged by the appellant that Section 115 of Chapter 158 of the Public Laws of North Carolina, Session 1939, as amended was repugnant to Section 8 of Article I of the Constitution of the United States and Section 1 of the Fourteenth Amendment of the Constitution of the United States in that said act imposed a direct burden upon interstate commerce and in that said act imposed a tax upon a transaction consummated beyond the territorial limits of the State of North Carolina. (Complaint paragraphs 17, 18, 20, 22; R. P. 8 to 10, incl.)

The action came on for trial before William H. Bobbitt, Judge Presiding, at the regular December Civil term of the Superior Court of Buncombe County. (R. P. 1, paragraph 4.) At said trial the appellant introduced certain portions of the complaint and answer in which were alleged and admitted the facts hereinabove recited. (R. Pp. 25 to 27, incl.)

Appellant submitted the testimony of horse and mule dealers bearing upon the construction given this act by the Commissioner of Revenue and his deputies, which testimony was excluded upon objection by respondent. (R. Pp. 28 to 32, incl.)

Counsel for appellant and for respondent submitted argument to the trial court upon the question of the constitutionality of the said Act. (R. P. 28.)

The trial Court entered judgment in favor of Defendant-Respondent in which judgment the Court declared the said Act to be constitutional and valid. (See Judgment—R. Pp. 23 and 24.)

To the aforesaid judgment the Plaintiff-Appellant duly objected and excepted and appealed to the Supreme Court of North Carolina, (Record page 24) assigning as error the action of the trial Court in holding the statute constitutional and entering the judgment shown in the record. (Record, page 32; Record, page 23.)

The Supreme Court of the State of North Carolina is the highest court in the State and that court entered final judgment affirming the judgment of the Superior Court of Buncombe County, upholding the constitutional validity of the statute involved, and holding that such statute was applicable in the instant case. (Appendix A—Opinion of the Supreme Court of North Carolina.)

The Appellant contends that the Act in question imposes a direct and undue burden upon interstate commerce and is, therefore, unconstitutional, and repugnant to Article I, Section 8 of the Constitution of the United States and that the Act imposes a tax upon a transaction consummated beyond the territorial limits of the State of North Carolina and, as applied in the instant case, deprives Appellant of his property without due process of law and is, therefore, unconstitutional and repugnant to Amendment XIV, Section 1 of the Constitution of the United States.

The Appellant further specifically contends that the Act in question imposes an undue burden upon interstate commerce (1) in that said act exacts of persons, firms, and corporations engaged in the business of purchasing horses and mules for resale a tax, in addition to the fixed schedule of annual taxes imposed, of $3.00 per head on horses and mules purchased, which additional tax only first dealers and consignees receiving said horses and mules in the State of North Carolina are absolutely required to pay, thereby in practical operation and effect exaction an entrance duty, excise, or tariff of persons, firms, and corporations importing horses and mules into a non-stock raising State; (2) in that said act exacts a license tax of persons, firms, and corporations engaged in the business of purchasing horses and mules for resale, which tax is made proportionate to the number of horses and mules purchased, including horses and mules purchased in interstate commerce, without apportionment, thereby subjecting persons, firms, and corpo-

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rations purchasing horses and mules in interstate commerce to the risk of a multiple tax burden; and (3) in that said act in exempting purchasers of horses and mules for resale from the payment of additional $3.00 per head tax upon horses and mules accepted in part payment of horses and mules sold permits and allows an exemption to horses and mules bred in North Carolina not granted to horses and mules produced in foreign States.

The Supreme Court of the State of North Carolina considered these questions as to whether or not the Act was unconstitutional as applied to the Appellant in the instant case, and ruled that said Act did not violate the Commerce Clause or the Fourteenth Amendment of the Constitution of the United States.

E

Cases Believed to Sustain Jurisdiction

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Eureka Pipe Line Co. v. *Hallahan*, 257 U. S. 265, 42 S. Ct. 101, 66 L. Ed. 227 (1921);

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921);

Kansas City Southern Railway Co. v. *Road Improvement District No. 3*, 266 U. S. 379, 69 L. Ed. 335 (1924);

Best & Co. v. *Maxwell*, 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. (1940).

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and that the inquiry, then, is whether Section 115 of Chapter 158 of the Public Laws of North

Carolina, Session 1939, as amended by Subsection "E," Section 3, Chapter 50 of the Public Laws of North Carolina, Session 1941 is constitutional as applied and enforced in respect to the instant case.

Respectfully submitted,

LAMAR GUDGER,
Counsel for Appellant.

SILAS G. BERNARD,
Of Counsel for Appellant.

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APPENDIX A

Opinion of the Supreme Court of the State of North Carolina

IN THE SUPREME COURT OF NORTH CAROLINA

Spring Term, 1947

No. 96—Buncombe

P. M. Nesbitt

vs.

Edwin M. Gill, Commissioner of Revenue of North Carolina

Appeal by plaintiff from Bobbitt, J., at December Term, 1946, of Buncombe.

This is an action to recover taxes paid under protest.

The plaintiff, a citizen and resident of Buncombe County, North Carolina, on or about 15 March, 1943, purchased seventy-eight horses from ranches located in the State of Montana, and had them shipped to him at Asheville, N. C., during the months of June and July, 1943. Thereafter, on or about 3 April, 1945, the plaintiff paid the defendant, under protest, the sum of $407.40, which represented the taxes due the State, by the plaintiff, including penalties for late filing, under the provisions of Section 115 of the Public Laws of 1939, G. S. 105-47. Demand for the refund of the tax and penalties was duly made. The defendant refused to make the refund, and this action was duly instituted.

Upon the pleadings and evidence offered in the trial below, the Court held: That the tax levied by the aforesaid statute is a valid license or privilege tax upon the business of purchasing horses and/or mules for resale within the State of North Carolina; that it applies alike to purchases of horses and/or mules raised within or without the State and is applicable only to horses and/or mules purchased for resale within the State of North Carolina, and entered judgment that the plaintiff recover nothing by his action

and that the same be dismissed. Plaintiff appeals to the Supreme Court, assigning error.

Lamar Gudger and Don C. Young for plaintiff.

Attorney General McMullan and Assistant Attorneys General Spruill and Moody for defendant.

DENNY, J.:

The plaintiff alleges and contends that Section 115 of the Revenue Act of 1939, as amended, purporting to levy the tax involved herein, is unconstitutional, in that: (1) Purchasing horses and/or mules for resale is not a trade or profession within the meaning of Article V, Section 3, of the Constitution of North Carolina; (2) The levy of a head tax of $3.00 upon horses and/or mules purchased for the purpose of resale exacted by subsection (a) of Section 115, of said Revenue Act, as amended, is a tax on property and as such is unconstitutional and void, being in violation of the aforesaid Section of our State Constitution; (3) The Act does not levy a head tax on horses and/or mules raised in North Carolina and is therefore, in contravention of Article I, Section 8, clauses 1 and 3, of the Constitution of the United States; and (4) The head tax levied under the Act imposes an undue burden upon interstate commerce by subjecting interstate purchases of horses and/or mules to the risk of multiple taxation and by exempting "horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section" from said tax.

The pertinent parts of Section 115, of the Revenue Act of 1939, as amended, now G. S. 105-47, read as follows:

"Every person, firm, or corporation engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall apply for and procure from the commissioner of revenue a state license for the privilege of engaging in such business in this state and shall pay for such license an annual tax for each location where such business is carried on as follows:

"Where not more than one carload of horses and/or mules is purchased for the purpose of resale.....$25.00.

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"Where more than one carload and not more than two carloads of horses and/or mules are purchased for the purpose of resale.....$50.00.

"Where more than two carloads of horses and/or mules are purchased for the purpose of resale.....$100.00.

"For the purpose of calculating the amount of tax due under the above schedule, a carload of horses and/or mules shall be twenty-five (25).

"(a) In addition to the annual licenses levied in this section, every person, firm or corporation, engaged in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules shall pay a tax of three dollars ($3.00) per-head on all such horses and/or mules purchased for the purpose of resale. 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale, either at wholesale or retail: Provided, however that 'purchases' shall not include the acquisition of horses and/or mules which are acquired or received as a result of an allowance for credit for horses and/or mules taken in part payment on horses and/or mules subject to the tax imposed in this section nor shall it include horses and/or mules which have been repossessed as a result of nonpayment of the original sales or purchase price. 'Purchases' shall include all horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this state by railroad or brought in otherwise. * * *

"(b) The additional per-head tax levied in this section on purchase of horses and/or mules purchased for the purpose of resale, either at wholesale or retail, shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Article V, Section 3, of our State Constitution, among other things, provides that "The power of taxation shall be exercised in a just and equitable manner. Taxes on property shall be uniform as to each class of property

taxed. * * * The General Assembly may also tax trades, professions, franchises and incomes." The appellant contends that the business of purchasing horses and/or mules for the purpose of resale in North Carolina is not a trade within the meaning of the above section of our Constitution. This contention is not in accord with the uniform decisions of this Court. In defining the meaning of the word "trades," as used in the above Sections of our Constitution, in the case of State *v.* Worth, 116 N. C., 1007, 21 S. E., 204, this Court said: "This word trade is often used in a more restricted sense to mean either the particular occupation of a mechanic or a merchant; but where it is used in defining the power to tax its broadest signification is given to it and it is interpreted as comprehending not only all who are engaged in buying and selling merchandise but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or profit." This interpretation as to the meaning of the word "trades," as used in the above Section of our Constitution, has been approved in Mercantile Co. *v.* Mount Olive, 161 N. C., 121, 76 S. E., 690; Bickett *v.* Tax Commission, 177 N. C., 435, 99 S. C., 415; State *v.* Elkins, 187 N. C., 533, 122 S. E., 289; Hilton *v.* Harris, 207 N. C., 465, 177 S. E., 411 and State *v.* Dixon, 215 N. C., 161, 1 S. E. (2d.), 521. Hence, we hold that when a person, firm or corporation, in North Carolina, engages in the business of purchasing for the purpose of resale, either at wholesale or retail, horses and/or mules, such person, firm or corporation is a dealer in said animals, and as such is pursuing a trade within the meaning of that term as used in Article V, Section 3, of our State Constitution.

The appellant challenges the validity of the per head tax on the ground that it is a property and not a privilege or license tax, and lacks that uniformity required for ad valorem taxes.

Prior to the enactment of Section 115, of the Revenue Act of 1939, as amended, any person, firm or corporation engaged in the business of purchasing and selling horses and/or mules in North Carolina, was required to pay a minimum license tax of $12.50 for the privilege of selling

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one carload of horses and/or mules, and $5.00 for each additional carload purchased. In computing the tax twenty-five horses and/or mules were considered a carload and when a car contained in excess of that number an additional tax of twenty-five cents per head in excess of twenty-five, was required to be paid. In addition thereto, a sales tax of 3% was levied for the privilege of carrying on said business. In 1939, the annual license and head tax, was substituted, as set forth herein, and the sales of horses and/or mules were expressly exempted from the sales tax. G. S. 105-169, Subsection (n).

The General Assembly is not restricted to uniformity as between trades or professions in levying a privilege or license tax. However, the tax must apply equally to all persons belonging to the prescribed class upon which it is imposed. Gatlin *v.* Tarboro, 78 N. C., 122; Smith *v.* Wilkins, 164 N. C., 135, 80 S. E., 168; Provision Co. *v.* Maxwell, Comr. of Rev., 199 N. C., 661, 155 S. E., 557; Leonard *v.* Maxwell Comr. of Rev., 216 N. C., 89, 3 S. E. (2d.), 316. If a privilege or license tax is reasonable and just, and applies alike in its exactions and exemptions to all persons belonging to the prescribed class or business, it is not objectionable under the provisions of the Constitution of North Carolina for lack of uniformity. In Leonard *v.* Maxwell, Comr. of Rev., Supra, Stacy, C. J., in speaking for the Court, said: "In levying a sales tax as a license or privilege tax, the General Assembly may set apart certain trades, callings, or occupations for imposition of the tax and exclude others from its operation. Smith *v.* Wilkins, 164 N. C., 136, 80 S. E., 168. The tax may be fixed at a flat rate for some, graduated as to others, and withheld from others. S. *v.* Carter, 129 N. C., 560, 40 S. E., 11; S. *v.* Powell, 100 N. C., 526, 65 S. E., 424. One business may be taxed and another left untaxed. Carmichael *v.* Coal & Coke Co., 201 U. S., 495, 109 A. L. R., 1327. Reasonable selection or classification of the subjects for such taxation may be made by the General Assembly and different rates or different modes and methods of assessment applies to different classes. Rosenbaum *v.* New Bern, 118 N. C., 83, 24 S. E., 1; S. *v.* Stevenson, 109 N. C., 730, 14 S. E., 385, 26 A. L. R., 595. A

wide latitude is accorded the taxing authorities in the selection of subjects for taxation, particularly in respect of occupation taxes. Oliver Iron Mining Co. *v.* Lors, 262 U. S., 172."

The amount of a privilege or license tax may be determined by the population of the city or town in which the business is to be conducted. Or, it may be determined by gross sales or the aggregate *n*aumber of sales of a commodity handled—such as cotton. Albertson *v.* Wallace, 81 N. C., 479, 103 A. L. R., 26n; Smith *v.* Watkins, supra. It has been the practice of our General Assembly for many years to levy what is considered a nominal sum for an annual license for engaging in some classes of trades and to levy in addition thereto, an additional privilege or license tax measured by some reasonable method for ascertaining the volume of business transacted in the State. In Albertson *v.* Wallace, supra, it is said: "We see no just objection to the mode adopted for ascertaining and determining the amount of the privilege tax and making it dependant upon the extent of the business of which the amount of the aggregate purchases may be as accurate a test or measure as any other that could be adopted. This mode of taxing is, in our opinion, eminently fair and reasonable in its operation. A specific tax of a definite sum upon a trade, without regard to the extent of the trader's operations, and pressing with the same force on one whose business is small as upon the large operator, would be very unequal. The ability to pay increases with an increased and successful business, and it is just and proper to gauge the sums to be paid upon that principle. This is what the statute undertakes to do, and no more, and it lies within the discretion of the taxing power to levy the privilege tax under this rule."

In requiring the payment of a head tax by dealers in horses and/or mules, the General Assembly did not levy a tax on the privilege or right to purchase horses and/or mules, nor did it levy an ad valorem tax on the animals purchased, but the statute expressly levies the tax on every person, firm or corporation engaged in the business of purchasing horses and/or mules for the purpose of resale. The General Assembly adopted this method as a fair and

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reasonable one for ascertaining the amount of such tax to be paid, in addition to the annual license tax. In determining whether or not the power to tax has been exercised in a "just and equitable manner," the Court may take into consideration the fact that in levying a particular license or privilege tax upon a business, such business is exempt from some other comparable tax. Cudahy Packing Co. *v.* Minnesota, 246 U. S., 450, 62 L. Ed., 827; Maine *v.* Grand Trunk Railway Co., 142 U. S., 217, 35 L. Ed., 994; Powell *v.* Maxwell, Comr. of Rev., 210 N. C. 211-186 S. E. 326; Johnson *v.* Gill, Comr. of Rev., 224 N. C., 638, 32 S. E. (2d.), 30. In view of the fact that the sales of horses and/or mules have been exempted form the 3% sales tax, and the head tax substituted, we think the levy is just and equitable and not in conflict with the provisions of our State Constitution.

The appellant also attacks the validity of the head tax on the ground that the Act discriminates as between local and interstate commerce, in that, under the terms of the Act, the tax does not apply to North Carolina bred horses and/or mules. The statute provided that " 'Purchase' shall be taken to mean and shall include all horses and/or mules acquired or received as a result of outright purchase or on consignment, account or otherwise for resale either at wholesale or retail." We do not think there is any ambiguity in the above provision of the statute, but that it is clear that the aggregate amount of the head tax is measured by the number of horses and/or mules purchased for resale, except such purchases as may be expressly exempted therefrom by other provisions in the statute.

The amount of the tax to be paid at the time of obtaining the annual license is graduated according to the number of carloads of horses and/or mules purchased for resale. For the purpose of calculating the amount of the tax due under the above schedule, a carload of horses and/or mules shall be twenty-five. We do not think the general levy is changed or limited by a further provision in the Act that "purchases shall include horses and/or mules acquired for the purpose of resale, either at wholesale or retail, whether such horses and/or mules are shipped into this State by railroad or brought in otherwise." We are of the opinion this further

provision was inserted to emphasize the fact that all the horses and/or mules brought into the State may not be shipped over railroads or in carload lots, but that the tax is assessed on all horses and/or mules brought in regardless of the manner of transportation.

The appellant further contends the levy is limited to foreign bred horses and/or mules, since the head tax on the business of purchasing horses and/or mules for resale, does not become due and payable until the dealer receives such animals "within this State." However, we think this provision in the statute merely fixed the time the tax becomes due and payable and applies with equal force to purchases made within the State. It simply means the dealer is not required to pay the tax when he purchases horses and/or mules for resale until such animals come into his possession within the State, regardless of the date of purchase or the origin of the shipment.

An act of the General Assembly will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt. And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality. Brumley *v.* Baxter, 225 N. C., 691, 36 S. E. (2d.), 281, 162 A. L. R., 931; Turner *v.* Reidsville, 224 N. C., 42, 29 S. E. (2d.) 211; Bridges *v.* Charlotte, 221 N. C., 742, 20 S. E. (2d), 825; Morris *v.* Holshouser, 220 N. C., 293, 17 S. E. (2d.), 115, 137 A. L. R. 733; Snyder *v.* Maxwell, 217 N. C., 617, 9 S. E. (2d.), 19; Tobacco Co. *v.* Maxwell, 214 N. C., 367, 199 S. E., 405. If a statute is susceptible to two interpretations, one constitutional and the other not, the former will be adopted. State *v.* Lueder, 214 N. C., 558, 200 S. E., 22; State *v.* Williams, 209 N. C., 57, 182 S. E., 711.

The remaining question is to determine whether or not this Section of our Revenue Act imposes an undue burden upon interstate commerce.

It is well settled that a State cannot levy a tax which directly or indirectly imposes an undue burden upon interstate commerce. Gwin, White & Prince *v.* Henneford, 305 U. S., 434, 83 L. Ed., 272; Baldwin *v.* Seelig, 294 U. S., 511, 79 L. Ed., 1032; 101 A. L. R., 55. This does not mean however, that interstate commerce is to be relieved wholly of

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state taxation. In the case of Western Live Stock *v.* Bureau of Revenue, 303 U. S., 250, 82 L. Ed., 823, Stone, C. J., Speaking for the Supreme Court of the United States, said: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' • • • and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."

The appellant is relying strongly upon the case of Gwin, White & Prince *v.* Henneford, supra, in which the State of Washington undertook to levy a tax measured by the gross receipts of the appellant derived from its business of marketing fruit shipped from the State of Washington to points outside the State, including foreign countries. The appellant was engaged exclusively in interstate commerce. The tax was held invalid because it discriminated against interstate commerce, in that it imposed upon it, merely because interstate commerce was being done, the risk of a multiple burden to which local commerce was not exposed.

In the case of Western Live Stock *v.* Bureau of Revenue, supra, the State of Mexico levied a privilege tax of 2% of amounts received from the sale of advertising space by one engaged in the business of publishing newspapers or magazines. The appellants, who sold to advertisers outside the State, space in a magazine they published in New Mexico and circulated to subscribers within and without the State, challenged the validity of the tax on the ground that it was an undue burden on interstate commerce. The Court said: "In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax. This Court has sustained a similar tax said to be on the privilege of manufacturing, measured by the total gross receipts from sales of the manufactured goods both intra and interstate. American Mfg. Co. *v.* St.

Louis, supra (250 U. S., 462, 33 L. Ed., 1087, 39 S. Ct. 522). The actual sales prices which measured the tax were taken to be no more than the measure of the value of the goods manufactured, and so an appropriate measure of the value of the privilege, the taxation of which was deferred until the goods were sold." And in American Mfg. Co. *v.* St. Louis, supra, the Court said: "The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory."

In applying the principle laid down in the above decisions, we hold the tax under consideration is a levy on a local business for the privilege of engaging in such business, and does not place a burden upon interstate commerce. Powell *v.* Comr. of Revenue, supra. Therefore, the risk of multiple taxation is not involved. Consequently, the further contention that the various exemptions contained in the Act make it discriminatory and in contravention of the commerce clause, is without merit.

The General Assembly has exempted those engaged in the business of buying and selling horses and/or mules from paying the head tax on certain purchases, exchanges and repossessions. The law simply provides: (1) A dealer is relieved of the payment of a head tax when purchasing horses and/or mules from another dealer within the State who has paid the tax; (2) That in selling horses and/or mules, the dealer will be exempt from paying a head tax on any horses and/or mules he may accept in part payment thereof; and (3) Such dealer is exempted from paying an additional head tax on any horses and/or mules he may find it necessary to repossess as a result of the nonpayment of the original sales or purchase price. Whether or not the General Assembly acted wisely in granting these exemptions, is not before us for decision. We do think, however, it had the power to grant them without violating any of the provisions of our State or Federal Constitution. In levying a tax for the privilege of engaging in business, certain transactions may be exempted from tax liability so long as the exemptions apply alike to all who are engaged in business within the particular classification and "rea-

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sonable and pertinent bases for said classification and exemptions are readily discernible," Leonard *v.* Maxwell, Comr. of Revenue, supra. Smith *v.* Watkins, supra; Mercantile Co. *v.* Mount Olive, supra; Cobb v. Commissioners, 122 N. C., 307, 30 S. E., 338; Stewart Machine Co. *v.* Davis, 301 U. S., 548, 81 L. Ed., 799, 109 A.L.R., 1293.

In granting these exemptions we find no arbitrary or unjust exercise of the "'power to tax" on the part of the General Assembly.

The judgment of the Court below, is

Affirmed.

BARNHILL, *J.*, dissenting in part:

Insofar as the majority conclude that the "per carload" privilege tax levied under G. S. 105-47 is valid and enforceable I concur. However, I cannot subscribe to the conclusion that the additional "per head" tax is a license or privilege tax and as such is a lawful exercise of the taxing power. In my opinion it constitutes an undue and unlawful burden on interstate commerce.

North Carolina is not a stock-raising state. The number of horses and mules raised in this State for sale on the market is so negligible they constitute only an infinitesimal fraction of the total. Certainly 98% or more are shipped into the State. S. *v.* Vick, 213 NC 235, 195 SE 779. Perhaps the consciousness of this fact prompted the Legislature, in defining "purchase," to use the significant language "whether such horses and/or mules are shipped into this state by railroad or brought in otherwise;" and later to provide that the tax "shall be due and payable immediately upon receipt of such horses and/or mules within this state."

Under the taxing provision of the Act, A buys horses and mules out of the State and has them shipped into the State for resale. He must pay a franchise tax of $3.00 per head. He resells by carload lot to B, C, and D, dealers who purchase for resale. They pay the carload tax but pay no per head tax. Thus the purchaser whose mules are shipped into the State pays while the dealer whose source of supply is within the State does not pay.

This, in a nut shell, presents my views. The question is one of construction. If I correctly read the statute it is, as a privilege tax, so clearly in contravention of the Federal Constitution as interpreted by the United States Supreme Court further discussion or citation of authority is unnecessary. I vote to affirm as to the per carload tax and reverse as to the per head tax.

DEVIN, *J.*, joins in this opinion.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 132

P. M. NESBITT,

Appellant,

vs.

EDWIN M. GILL, COMMISSIONER OF REVENUE OF NORTH CAROLINA

BRIEF OPPOSING MOTION TO DISMISS

P. M. Nesbitt, Appellant of this appeal to the Supreme Court of the United States for writ of error to the Supreme Court of North Carolina submits this its brief opposing motion to dismiss heretofore filed in this cause by appellee, Edwin M. Gill, Commissioner of Revenue of North Carolina.

Inasmuch as said motion to dismiss is founded exclusively upon appellee's contention that each of the four assignments of error entered and submitted by the appellant are frivolous and present no substantial Federal question for the decision of this Court, appellant will direct his argu-

ment solely to the merits of the four assignments of error in the order in which they are presented:

I

Assignment of Error Number One

"The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the public Laws of North Carolina, Session 1939, as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, exacts of persons, firms, and corporations engaged in the business of purchasing horses and/or mules for resale, in addition to a fixed schedule of annual taxes imposed, an additional tax or fee of $3.00 per head on horses and mules purchased, which additional per head tax only first dealers or consignees receiving horses or mules within the state are absolutely required to pay and from which tax subsequent purchasers for resale or otherwise are relieved, thereby in practical operation and effect exacting an entrance duty, excise or tariff of horses and mules purchased in interstate commerce for import into a non-stock raising state."

The Supreme Court of North Carolina in the decision here subject to review placed the following construction upon Section 115 of the Revenue Act of 1939: (a) that the business of purchasing horses and mules for resale is the business of dealing in horses and mules and as such is taxable by virtue of Article V, Section 3 of the Constitution of North Carolina; (b) that the tax under consideration is a levy on this business for the privilege of engaging therein; and (c) that the additional per head tax is the method

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adopted by the General Assembly of North Carolina for ascertaining the amount of such tax to be paid, in addition to the annual license tax.

Nesbitt v. *Gill*, 227 N. C. (Adv. Sheets) 174 (1947).

This construction, being a matter of State law, is binding upon this Court.

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938);

Supreme Lodge K. P. v. *Meyer*, 265 U. S. 30, 32, 33, 68 L. Ed. 885, 887, 888, 44 S. Ct. 432 (1922);

Hicklin v. *Coney*, 290 U. S. 169, 172, 78 L. Ed. 247, 249, 54 S. Ct. 142 (1933);

Hartford Acc. & Indemn. Co. v. *Nelson Mfg. Co.*, 291 U. S. 352, 358, 78 L. Ed. 840, 845, 54 S. Ct. 392 (1933).

However, it appears to be well established that the construction placed upon an act by the State court "is not determinable of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect."

Richfield Oil, Corp., v. *State Board of Eq.*, — U. S. —, 91 L. Ed. 123, 131 (1946);

St. Louis SW. R. Co. v. *Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. 99 (1914);

Kansas City, Ft. S. & M. R. Co. v. *Botkin*, 240 U. S. 227, 231, 60 L. Ed. 617, 618, 36 S. Ct. 261 (1916).

And in *Gwynn, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, 439, 83 L. Ed. 272, 276 (1938), this Court declared unconstitutional and void as to sales made by appellant fruit dealer outside of the State of Washington a gross receipts tax "for the act or privilege of engaging in busi-

ness activities in the state of Washington" and declared in the majority opinion of the court:

> "The present tax, though nominally local, thus in its practical operation discriminated against interstate commerce * * *."

It is submitted that the Supreme Court of the United States does not lack jurisdiction to review the decision of the Supreme Court of a State in which such court construes and declares that a statute levying a license tax applies only to a local business, where as in actual operation and effect such tax as so levied imposes a burden upon interstate commerce.

The appellee contends that the Act as construed by the Supreme Court of North Carolina and as applied to the Appellant, taxpayer, imposes a license tax upon a local dealer for engaging in a local business, and that such construction and application is binding upon this Court.

It is common knowledge that North Carolina is not a stock-raising State. A fact of which this Court may take judicial notice.

P. A. Schulte, Inc. v. *Gangi*, 326 U. S. 712, 90 L. Ed. 1113 (1945);
Parker v. *Brown*, 317 U. S. 341, 87 L. Ed. 315 (1942);
Sligh v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835 (1915);
Ohio Bell Telephone Co. v. *Public Utilities Comm.*, 301 U. S. 292, 81 L. Ed. 1093 (1936);
Brown v. *Piper*, 91 U. S. 37, 23 L. Ed. 200 (1875).

And it is a fact recognized by Appellee in its statement against jurisdiction and by the Supreme Court of North Carolina in this case. (*Nesbitt* v. *Gill*, 227 N. C. (Adv. Sheets) 174, 183 (1947) dissent of Barnhill, J.) that substantially all horses and mules bought and sold in North Carolina are originally brought into North Carolina from

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other States by first dealers and consignees purchasing for purpose of resale.

It is well established that the purchase of an article in one State for transportation to a second State and the actual transportation to the second State constitute Interstate Commerce.

McLeod v. *Dilworth*, 332 U. S. 327, 88 L. Ed. — (1943);
Curren v. *Wallace*, 306 U. S. 1, 83 L. Ed. 441 (1938);
Schafer v. *Farmers Grain Co. of Eubden*, 268 U. S. 189, 69 L. Ed. 909 (1929);
Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 56 L. Ed. 458 (1921).

Thus it is submitted that interstate Commerce is an essential and integral element of the business of purchasing horses and mules for purpose of resale as that business is defined by the Supreme Court of the State of North Carolina.

It is urged by the appellee that any burden imposed on such interstate commerce by the taxing statute "is an incidental consequence of the situation rather than a direct burden resulting necessarily from this operation of the statute."

Dealing in the article here taxed, however, within the definition contained in the taxing statute, consists of two integral and basic elements: purchasing horses and mules for resale, and ultimately selling them. There would be no taxable business without the purchase, which is the measure of the tax.

Obviously, this being true, the rule set forth in the following cases is inapplicable:

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823 (1937);
American Mfg. Co. v. *St. Louis*, 205 U. S. 462, 33 L. Ed. 1087, 39 S. Ct. 522 (1938).

For in each of these cases the business taxed was of purely a local nature and the interstate transactions in which it engaged were quite incidental and in no measure an essential part of the business taxed.

In *Sonneborn Bros.* v. *Keeling*, 262 U. S. 506, 67 L. Ed. 1095 (1922) this Court sustained as constitutional the exaction of a license fee or occupation tax upon a resident merchant which tax was determined on the basis of gross receipts derived from the sale of oil in the taxing State all or a portion of which oil had been imported by the taxpayer from other States.

In that case the license tax imposed upon appellant-taxpayer was a uniform occupation tax imposed upon all wholesale dealers in coal and petroleum oils requiring the payment of a percentage of all gross receipts from all sales made by them within the State.

Similarly this Court has sustained as applicable to receipts from sales of imported goods, wares and merchandise, a uniform State sales tax Act,

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, a State Gross Income Tax Act;

Dept. of Treas. v. *Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188 (1940),

and a tax upon the local use and enjoyment thereof collected through the merchant selling the article for local consumption,

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814 (1936);

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888 (1940);

General Trading Co. v. *State Tax Comm.*, 322 U. S. 335, 88 L. Ed. 275 (1940).

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But in each of these cases the tax has applied uniformly to receipts from all sales by wholesale or retail merchants taxed.

Yet, under the statute whose constitutionality is here challenged only first dealers and consignees receiving horses and mules within the State of North Carolina are absolutely required to pay the additional license fee of $3.00 per head on horses and mules purchased for resale. And of the horses and mules so purchased a substantial majority are imported from other States.

This Court and the Supreme Court of North Carolina have repeatedly sustained as constitutional occupation taxes determined and made proportionate to the total number of sales or number of purchases made by the licensed taxpayer where such was a reasonable index of the volume of business done and the value of the privilege licensed.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547 (1918);

Albertson v. *Wallace*, 81 N. C. 479, 103 A. L. R. 26 n (1879).

Where, however, less than the total number of sales or purchases made determines the amount of the license tax or fee and the tax or fee is thus made proportionate to the amount of interstate business done, it is submitted that the tax violates the Commerce Clause of the Constitution of the United States.

Although this Court has repeatedly declared that it is not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their fair share of the State tax burden, it has also stated that "a fair share precludes legislation obviously hostile or practically discriminating toward Interstate Commerce."

International Harvester Company v. *Dept. of Treasury of Indiana*, 322 U. S. 340, 88 L. Ed. 1313 (1943).

It is submitted that a license or occupation tax is vastly different from the gasoline tax declared constitutional by this Court in *Gregg Dying Co.* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232 (1932), which is a use or privilege tax generally appropriated to the maintenance of State highways and collected by the dealer from the ultimate consumer as a charge or tax for the use of State highway facilities.

The Supreme Court of North Carolina has construed and declared the instant tax to be a license or occupation tax. As such it is a tax upon the privilege of engaging in this particular business licensed. It is imposed upon the dealer and borne by the dealer. And unlike the uniform sales or compensating use tax, the dealer does not collect all or any part of the license tax from the ultimate consumer. If the license tax results in an increase in the cost to the consumer of an article dealt in, such increased cost is purely incidental.

It is submitted that of horses and mules purchased for resale in North Carolina by the first dealer to market such horses and mules substantially all are imported from other States; that the instant act imposes an additional license fee only on first dealers purchasing horses and mules for resale, permitting an exemption to dealers in horses and mules on the basis of which a first dealer has previously paid an additional license fee; that the result of this exemption is to tax importers of horses and mules at a higher rate than dealers in local horses and mules; and that the instant act thus discriminates against interstate commerce.

For the effect of the Act, as a tax upon an occupation, or trade, is thus to single out dealers in that trade who engage in interstate commerce for an additional license tax to which dealers engaged solely in local commerce are not exposed.

Such a tax upon an occupation or privilege is repugnant

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to the Commerce Clause of the Constitution of the United States.

II

Assignment of Error Number Two

> "The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article 1, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, imposes an unlawful burden upon interstate commerce by imposing a tax upon persons engaged in the business of purchasing horses and mules for purpose of resale, which tax is made proportionate to the total number of horses and mules purchased, including horses and mules purchased in other states, without apportionment, thereby subjecting persons engaged in the business of purchasing for resale horses and mules in interstate commerce to the risk of a multiple tax burden."

This Court has repeatedly declared unconstitutional as applied to interstate carriers State Revenue Acts exacting a fixed percentage of the entire gross receipts of the business without apportionment to the amount of business done within the State.

Galveston H. and S. A. Ry. Co. v. *Texas,* 210 U. S. 217, 52 L. Ed. 1031 (1909);

Meyer v. *Wells, F. & Co.,* 223 U. S. 298, 56 L. Ed. 445 (1912);

Cudahy Packing Co. v. *Minnesota,* 246 U. S. 450, 62 L. Ed. 827 (1918);

Northwest Airlines v. *Minnesota,* 322 U. S. 291, 88 L. Ed. 1283 (1943).

This rule has been applied without regard to whether or not the taxing State was the State of residence of the taxpayer.

Philadelphia & S. M. S. S. Co. v. *Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1203 (1887);
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292, 62 L. Ed. 295 (1917).

Or whether or not the tax was "nominally local" in that it purported to tax a local taxpayer for operating a local business.

Leloup v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311 (1887);
Gwin, White & Prince v. *Henneford, supra.*

Similarly this Court has held that a tax upon the gross receipts of a resident merchant selling all or part of its merchandise in interstate commerce is unconstitutional and void.

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, 82 L. Ed. 1865 (1937);
Gwin, White, & Prince v. *Henneford, supra;*
Freeman v. *Hewitt*, 12 L. W. 4077 (U. S. S. Ct. 1946);
Crew Levick Co. v. *Penn.*, 245 U. S. 292, 62 L. Ed. 295 (1917).

Thus, in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 439, 85 L. Ed. 272, 276 (1938) this Court held unconstitutional and void as to sales made by appellant fruit dealer outside of the State of Washington a gross receipts tax "for the act or privilege of engaging in business activities in the State of Washington," stating:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities in the state. If Washington is free to exact such a tax, other states, to

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which the commerce extends may with equal right, lay a tax similarly measured for the privilege of conducting within its respective territorial limits the activities there which contribute to the service. The present tax though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple tax burden to which local commerce is not exposed."

Cf. J. D. Adams Mfg. Co. v. *Storen, supra.*

It is submitted that this risk of a "multiple tax burden" is still the guiding test in determining the constitutionality of application of State taxes directly or indirectly tending to burden interstate commerce.

McLeod v. *Dilworth,* 322 U. S. 327, 88 L. Ed. 1304 (1943);

Freeman v. *Hewitt,* 15 L. W. 4077 (U. S. S. Ct. 1946).

It is submitted that the risk of a multiple tax burden exists in as great measure in the instant case where the license fee is measured by purchases and the purchases are made in interstate commerce and to the same extent as in the *Gwin, White, Prince* case where the license fee is measured by gross receipts from sales and the sales are made in interstate commerce.

As has been previously submitted, a substantial portion of the business of dealing in horses and mules as conducted by first dealers and consignees in North Carolina necessarily involves interstate purchase and transportation; the interstate commerce so induced is an essential and integral part of the business taxed; and to this extent the taxpayer is not engaged in a local business over which the State has sole and exclusive control.

Gwin, White, & Prince v. *Henneford, supra;*

J. D. Adams Mfg. Co. v. *Storen, supra;*

Henneford v. *Silas Mason Co., supra.*

Of the three State Use Tax Acts of Iowa, Washington and Indiana, most recently considered by this Court, all three Acts allowed credits for sales taxes paid on the article in the State of origin.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814 (1937);

Nelson v. *Sears Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888 (1940);

General Trading Co. v. *State Tax Comm.*, 322 U. S. 335, 88 L. Ed. 1309 (1943).

It is respectfully submitted, however, that even were a use tax which made no such exemption sustained by this Court under the rule of *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* that such a decision would not govern the instant case.

The instant Act applies the tax upon purchases uniformly without reference to the place of ultimate sale. No provision is made to allow rebate or readjustment in the event horses and mules taxed to the dealer upon receipt are subsequently sold in other States.

And, moreover, the taxable event considered significant in the *McGoldrick* case is the purchase, in this case effected in Montana. It is submitted that the State of Montana could exact either a sales tax of the horses and mules sold to appellant or a privilege tax upon his business of purchasing horses and mules for resale.

The risk of a multiple and cumulative tax burden is apparent.

And were the license fee imposed by the instant act made proportionate to the number of sales of horses and mules, the tax would be void as to sales effected outside North Carolina.

Gwin, White & Prince v. *Henneford, supra;*

J. D. Adams Mfg. Co. v. *Storen, supra;*

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Silas Mason Co. v. *Henneford, supra;*
Crew Levick Co. v. *Pennsylvania, supra.*

Inasmuch as the fees here imposed are made proportionate to the total number of purchases of horses and mules, are exacted prior to the sale of such horses and mules, and no provision is made for rebate to the taxpayer in the event such horses and mules are sold in interstate commerce, it is submitted that the Act is void as to purchases effected outside North Carolina.

The General Assembly having elected to impose the tax on the basis of purchases, the incidence of such tax must be limited to such purchases as are not subject to the multiple burden risk, and therefore to purchases which are effected in North Carolina and not such as are effected in other States.

III

Assignment of Error Number Three

"The Supreme Court of the State of North Carolina erred in failing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States because said act, as construed and applied by the Supreme Court of the State of North Carolina, exempts purchasers of horses and mules from the payment of the additional tax of $3.00 per head upon horses and mules accepted in part payment of other horses and mules sold, thereby in practical operation and effect permitting and allowing an exemption to local horses and mules not granted to horses and mules produced in foreign states."

It is common knowledge that high freight rates are charged for shipment of livestock and that only by reason of the peculiar advantages of certain western States are horses and mules produced there able to sell at comparatively low prices on the Eastern Seaboard. It is obvious that the great distance separating the western stock-raising States from North Carolina markets effectively prohibits exchange of local horses and mules for horses and mules produced in the western States, at the same time permitting such an exchange locally.

An act which upon its face appears to have universal application, yet in fact imposes an excessive burden, either by its actual direct incidence or by the practical operation of its exemptions and classifications, upon interstate commerce, is unconstitutional and void as to such commerce.

Best & Company v. *Maxwell*, 311 U. S. 454, 85 L. Ed. 275 (1940);

Bethlehem Motors Corporation v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029 (1920);

Caldwell v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336 (1902).

IV

Assignment of Error Number Four

"The Supreme Court of the State of North Carolina erred in refusing to find Section 115, Chapter 158 of the Public Laws of North Carolina, Session 1939 as amended by Subsection "E" of Section 3, Chapter 50, of the Public Laws of North Carolina, Session 1941, unconstitutional and repugnant to Article I, Section 8 of the Constitution of the United States, and Amendment 14 of the Constitution of the United States because as construed and applied to this appellant, said act imposes a state tax upon a transaction consum-

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mated beyond the territorial limits of the State of North Carolina."

Appellant in error concedes that under the rule of *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938) appeal on this assignment of error is foreclosed by the construction placed upon the contested act by the Supreme Court of North Carolina and, therefore, appellant's fourth assignment of error is abandoned.

V

A Substantial Federal Question

In *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233 (1938), this Court dismissed appeal for writ of error to the Court of Appeals of Kentucky, where, as is disclosed by reference to summary of appellant's brief contained in the official reports of this case, appellant sought to have this Court review the construction placed upon the statute by the State court. In dismissing the appeal this Court stated: "The construction of the statute by the state court is binding upon us."

As has been heretofore stated, appellant does not seek review of the construction placed upon the recent act by the Supreme Court of North Carolina, but does seek review of the constitutionality of the instant act as construed by the Supreme Court of North Carolina as the same is applied to this appellant.

It is submitted that the Supreme Court of the United States is not without jurisdiction to review the decision of the court of final jurisdiction of State upon writ of error where the Federal questions involved are not wholly frivolous.

Chicago, R. I. and Pac. R. Co. v. *Devine*, 239 U. S. 52, 60 L. Ed. 140 (1915);

Hunter v. *City of Pittsburgh*, 207 U. S. 161, 52 L. Ed. 151 (1907);

Offield v. *N. Y., N. H. & H. Co.*, 203 U. S. 372, 51 L. Ed. 231 (1906).

Similarly, it has been held that writ of error will not be dismissed for want of jurisdiction, where a Federal question is clearly raised, merely because the claim by which it is presented is not well founded.

Blythe v. *Hinkley*, 31 S. Ct. 390, 45 L. Ed. 557 (1901).

Nor because it appears that the Supreme Court of the State committed no error in deciding the Federal question involved.

Andrews v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366 (1902).

It is submitted that the Federal questions presented by the instant case have not been specifically treated in this Court by any prior decisions, and that analysis and exposition is necessary to make clear the effect of any prior decisions relating to questions comparable to those presented.

Furthermore, in view of the division of opinion in the Supreme Court of North Carolina on one or more of the Federal questions here presented for determination, it is submitted that even though prior decisions may exist which bear directly upon the Federal questions here presented for review that under the rule stated in *Louisville & Nashville R. Co.* v. *Welton*, 218 U. S. 36, 54 L. Ed. 921 (1909) this Court will not deny jurisdiction.

Appellee suggests that this appeal is barred by reason of the fact that appellant did not petition the Court of North Carolina for rehearing of this cause. It is submitted, however, that failure of a party litigant to petition for rehearing does not deprive the judgment of the State

court of finality so as to preclude writ of error to the Supreme Court of the United States nor does failure of appellant to petition for such rehearing waive or release any rights which he may have to a final determination of the Federal questions involved by the highest court of the land.

Southern Railway Co. v. *Clift*, 260 U. S. 16, 67 L. Ed. 283 (1922);

Andrews v. *Virginia R. Co.*, 248 U. S. 272, 63 L. Ed. 236 (1919);

Chicago, Great Western Ry. Co. v. *Besham*, 249 U. S. 164, 63 L. Ed. 534 (1919).

WHEREFORE, the appellant respectfully submits that this Court does not lack jurisdiction to hear appeal in this cause for writ of error to the Supreme Court of North Carolina and respectfully prays that motion to dismiss this appeal and affirm the judgment of the Supreme Court of the State of North Carolina be denied.

LAMAR GUDGER,
Counsel for Appellant;
SILAS G. BERNARD,
Of Counsel for Appellant.

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FILED
JUN 14 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 148 [redacted] 132

P. M. NESBITT

vs.

EDWIN GILL, COMMISSIONER OF REVENUE

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM

HARRY MCMULLAN,
Attorney General
of North Carolina;
FRANK P. SPRUILL, JR.,
JAMES E. TUCKER,
Assistant Attorneys General,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1489

P. M. NESBITT

vs.

EDWIN GILL, COMMISSIONER OF REVENUE

STATEMENT AGAINST JURISDICTION

Edwin Gill, Commissioner of Revenue of the State of North Carolina, the appellee in this appeal from the Supreme Court of North Carolina, files herewith a statement of matters and grounds making against the jurisdiction of this Court as provided by Rule 12 of this Court.

The appellant relies upon four asserted violations of the United States Constitution by the North Carolina taxing statute. These will be considered in this Statement in the order in which they are listed in the appellant's Assignment of Errors.

The appellee submits that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I

The appellant asserts that the taxing statute violates the interstate commerce clause because, in addition to the annual license tax on dealers in horses and mules, it imposes

a tax of $3.00 per head on horses and mules purchased for resale, "which additional per head tax only first dealers or consignees receiving horses or mules within the state are absolutely required to pay and from which tax subsequent purchasers for resale or otherwise are relieved, thereby in practical operation and effect exacting an entrance duty, excise or tariff of horses and mules purchased in interstate commerce for import into a non-stock raising state."

This contention involves no substantial federal question. The Supreme Court of North Carolina has held in this case that the additional per-head tax is neither a property tax nor a tax upon the right to purchase, but that it is a tax upon the local privilege of dealing in horses and mules, measured by the amount of purchases for resale in the state. This Court is bound by that construction of the statute. Therefore, the tax is not an "entrance duty" on horses and mules imported into North Carolina from other states.

This Court considered a similar question in *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233. There it appeared that a Kentucky statute imposed a tax on "the receipt of cosmetics in the state by any Kentucky retailer." The appellant contended that the statute was invalid as applied to articles purchased by the retailer from dealers outside the state, because the tax was laid on "the act of receiving" goods shipped into the state and was, therefore, a direct burden on interstate commerce. The state court had construed the statute as placing the tax, not on the actual receipt of the goods, but on the sale and use of the goods after they had come into the retailer's hands. On appeal to this Court it was held that no substantial federal question was involved because this Court was bound by the construction placed on the statute by the state court and because, in the light of that construction, the state court

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had applied correct principles as declared in this Court's decisions.

The tax imposed by this statute does not constitute any more an "entrance duty" or burden upon interstate property than does a tax imposed upon the "use" of property after its interstate journey has ceased.

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814;

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888;

Monomotor Oil Co. v. *Johnston*, 292 U. S. 86, 78 L. Ed. 1141;

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 76 L. Ed. 1232.

Or a sales tax imposed on the delivery within the state of property which has been transported in interstate commerce and has been brought to its journey's end.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Or an occupation tax upon a dealer in property which has been transported into the state from other states and subsequently sold.

Sonneborn Bros. v. *Cureton*, 262 U. S. 506.

Or a property tax imposed by the state of destination on property at the conclusion of its interstate journey.

Brown v. *Houston*, 114 U. S. 622, 29 L. Ed. 257;

Robbins v. *Taxing District*, 120 U. S. 489.

For purposes of the interstate commerce clause there is no distinction between a tax on property and a tax on the license to sell such property.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Thus, it is clear that the tax imposed by this statute cannot be a burden on interstate commerce, or an "entrance duty" on interstate property, for the tax is upon the privilege of dealing in that property after its interstate journey has ended.

This disposes of the appellant's contention that the tax is an "entrance duty" on horses and mules imported into North Carolina from other states. However, the appellant's assignment of error refers to that provision of the statute which provides that the first dealer purchasing horses and mules for resale in North Carolina shall be primarily liable for the additional per-head privilege tax and that, *in order to avoid double taxation*, dealers purchasing horses or mules from another dealer who has once paid the additional per-head tax as to those horses or mules shall be exempt from said additional per-head tax. If the appellant is suggesting that this exemption of subsequent dealers from the additional per-head tax discriminates against interstate commerce because the exempted subsequent dealers purchase in intrastate commerce, there still is no substantial federal question involved.

Under the construction placed on the statute by the Supreme Court of North Carolina *the per-head tax is imposed as to a particular horse or mule only one time*, regardless of whether that horse or mule comes to the first dealer from local sources or from interstate commerce. Thus, if the first dealer pays the per-head tax, the subsequent dealer is exempt. Each horse or mule, whether its origin is within or without the state, carries the burden of only one per-head tax. Under these circumstances there can be no greater burden on interstate commerce than on local commerce.

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"A tax or other burden obviously does not discriminate against interstate commerce where equality is its theme."

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814;

Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888.

If the per-head tax were also levied against every subsequent dealer in the same horse or mule, there would be obvious discrimination against local commerce, for each successive local sale of the horse or mule would increase, the tax burden by swelling the price until, finally, further trading in the horse or mule would be prohibited by the accumulated tax burden in the purchase price, whereas a horse or mule purchased in interstate commerce would carry the burden of only a single levy. Therefore, the exemption of the subsequent dealers in the same horse or mule in reality prevents a discrimination against local commerce which would otherwise result from a pyramiding of the tax burden. Under the statute, whether the horse or mule enters commerce from local or interstate channels, the exemption of subsequent dealers in the same horse or mule insures that the tax burden will remain the same.

In this view of the matter it is not important that the first dealer, who is primarily liable for the per-head tax, happens to derive his horses and mules from interstate commerce while the subsequent dealer derives his horses and mules from local dealers. Irrespective of the animal's origin each animal is burdened with the per-head tax only one time. The tax is not laid on the first dealer "merely because interstate commerce is being done." The fact that he is engaged in interstate commerce is incidental. If the first dealer purchased all his horses and

mules from local breeders, he would still be primarily liable for the tax under the statute.

Under the commerce clause we are concerned with the practical operation of the statute, not its definition or precise form of descriptive words.

> *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888.

Discrimination against interstate commerce is a practical conception and must involve a substantial distinction and a real injury. The burden is always on the taxpayer to show that, whatever distinction there may exist in form, there is substantial discrimination in fact.

> *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 76 L. Ed. 1232.

In the case just cited it appeared that a South Carolina statute imposed a tax on the use of gasoline after its interstate character ceased. The statute exempted gasoline purchased from South Carolina dealers who had paid a license tax in the same amount under another statute which provided that the tax should be passed on to the consumer. The taxpayer contended that the statute discriminated against interstate commerce because it exempted gasoline purchased from local dealers. This Court held that the statute, when considered with the statute taxing dealers, did not discriminate against interstate commerce because, as a practical matter, the tax burden imposed by the two statutes was equal on both interstate and intrastate gasoline.

There can be no substantial discrimination against interstate commerce under this statute where each horse or mule, regardless of its origin, is burdened with one per-head tax, and no more.

This result is not altered by the fact that most of the horses and mules sold in North Carolina may be purchased by dealers in interstate commerce. If the exemption imposes any burden upon interstate commerce because of the fact that North Carolina imports most of its horses and mules from other states, such burden is an incidental consequence of the situation rather than a direct burden resulting necessarily from the operation of the statute.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547.

It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state's tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing business.

McGoldrick v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565.

Therefore, whether the appellant's contention be regarded as one which designates this tax as an "entrance duty," or one which complains of discrimination, no substantial federal question is involved.

II

The appellant asserts that the statute "imposes an unlawful burden upon interstate commerce by imposing a tax upon persons engaged in the business of purchasing horses and mules for the purpose of resale, which tax is made proportionate to the total number of horses and mules purchased, including horses and mules purchased in other states, without apportionment, thereby subjecting persons engaged in the business of purchasing for resale horses and mules in interstate commerce to the risk of a multiple tax burden."

Presumably this contention has reference, not to the additional per-head tax imposed by the statute, but to the annual license tax which is measured by the number of horses and mules purchased for resale within the state. However, if this contention has reference to both the annual tax and the per-head tax, the question involved is the same.

This contention involves no substantial federal question. The North Carolina Supreme Court has construed the statute as imposing the tax on local dealers in horses and mules for the privilege of engaging in the local business of dealing in horses and mules. The tax is not one on a purchase, interstate or local, or on the right to purchase. Since the tax is one laid upon a purely local business, the risk of multiple tax burdens is not involved.

It is firmly established by the decisions of this Court that the commerce clause does not prevent a state from taxing a local business which is separate and distinct from interstate commerce, even though the tax be measured in part by interstate transactions.

American Mfg. Co. v. *St. Louis*, 250 U. S. 459;
N. Y., L. E. & W. R. Co. v. *Pennsylvania*, 158 U. S. 431;
Utah P. & L. Co. v. *Pfost*, 286 U. S. 165;
Oliver Iron Min. Co. v. *Lord*, 262 U. S. 172;
Coverdale v. *Ark.-La. Pipe L. Co.*, 303 U. S. 604;
Ficklen v. *Taxing District*, 145 U. S. 1;
Western Livestock v. *Bureau of Revenue*, 303 U. S. 250.

The state court's construction of the statute is binding on this Court.

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 83 L. Ed. 233.

The amount of purchases may properly be used as the measure of the tax upon the local privilege of dealing in the articles purchased.

Armour & Co. v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547;

Albertson v. *Wallace*, 81 N. C. 479;
State v. *Stevenson*, 109 N. C. 730;
State v. *French*, 109 N. C. 722.

III

The appellant asserts that the statute "exempts purchasers of horses and mules from the payment of the additional tax of $3.00 per head upon horses and mules accepted in part payment of other horses and mules sold, thereby in practical operation and effect permitting and allowing an exemption to local horses and mules not granted to horses and mules produced in foreign states."

This contention involves no substantial federal question. The statute clearly grants this exemption to local and interstate horses and mules alike.

IV

The appellant asserts that the statute violates the due process clause because it "imposes a state tax upon a transaction consummated beyond the territorial limits of the State of North Carolina."

This contention involves no substantial federal question. The Supreme Court of North Carolina has held in this case that the tax is imposed on local dealers for the privilege of engaging in the local business of dealing in horses and mules. The tax is not one upon a purchase, either interstate or local.

MOTION TO DISMISS OR AFFIRM

For the reasons set out above the appellee submits that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. All of the constitutional questions raised by this appeal have been thoroughly argued, examined and decided in the Supreme Court of North Carolina. Although the appellant had the right to request a rehearing of this cause in the Supreme Court of North Carolina, he elected not to request such rehearing.

Therefore, the appellee respectfully moves the Court that this appeal be dismissed or affirmed.

HARRY MCMULLAN,
Attorney General of North Carolina;
FRANK P. SPRUILL, JR.,
Assistant Attorney General;
JAMES E. TUCKER,
Assistant Attorney General.

(1182)

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No. 132. NESBITT *v.* GILL, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *Bacon & Sons* v. *Martin*, 305 U. S. 380; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472. *Silas G. Bernard* for appellant. *Harry McMullan*, Attorney General of North Carolina, for appellee. Reported below: 227 N. C. 174, 41 S. E. 2d 646.